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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WASHINGTON MILLS ELECTRO MINERALS CORP., WASHINGTON MILLS CERAMIC CORP., JOHN T. WILLIAMS, AND PETER WILLIAMS,
Petitioners,

v.

DE LONG EQUIPMENT CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. Respondent's brief in opposition confirms the importance of clearing up a dangerous ambiguity in this Court's often-used phrases, "vertical price agreement" or "vertical price fixing." In the abstract, the "prices" set by an agreement between a manufacturer and a distributor could be either (a) the distributor's prices on resale to its customers or (b) the manufacturer's prices to the distributor or to other buyers. Until this case, it has universally been recognized that the ambiguity was purely linguistic, not substantive, and that *per se* liability for "vertical price fixing" extends only to *resale* price maintenance. *See* Pet. 17, 23. As respondent's brief in opposition makes clear, however, the Eleventh Circuit's holding here rests entirely on its exploitation of the ambiguity and

its unprecedented expansion of vertical *per se* liability beyond resale price maintenance to cover an agreement on the *manufacturer's* wholesale prices.

Although the Eleventh Circuit at various places invoked the *per se* rule against "[r]esale price maintenance agreements" dating back to *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (*see* Pet. App. 2a, 57a), it is now undisputed that liability here cannot rest on that rule. The simplest reason is that, as a result of respondent's deliberate abandonment of any theory of resale price maintenance at trial, the district court refused to give any instructions asking the jury to make a finding, and there accordingly is no finding, on the essential element of resale price maintenance—an agreement between the manufacturer (Washington Mills) and the agreeing distributor (BCS) over the prices the latter would charge on reselling the product to its customers. Pet. 17-19. Without any finding of such an agreement, liability cannot rest on resale price maintenance—as respondent's brief in opposition acknowledges by its steadfast refusal to defend the decision on that basis.[1]

What the Eleventh Circuit decision in this case necessarily holds, therefore, is that there is a *per se* rule against "vertical price fixing" *other than* the *Dr. Miles* rule against

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[1] Indeed, respondent explains why there was no jury charge on resale price maintenance: such a charge would not have "reflected . . . the facts of this case." Opp. 15. Respondent's brief in opposition portrays the facts either with calculated fudge phrases (*e.g.*, "raw price fixing," "price-pegging," "heart of Petitioners' conspiracy," "concerned with resale prices," " 'padding,' " Opp. 8, 5, 11, 13) or as implicating resale prices on the theory that a "purpose" or "inevitable result" of the wholesale-price agreement was to affect resale prices (Opp. 5, 11, 13, 16). But, as the petition explains (Pet. 21), none of that amounts to the required proof of an actual agreement between Washington Mills and BCS setting the latter's resale prices, under the heightened standard of *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). In any event, this central factual issue was never put to the jury. That is why respondent carefully refrains from defending the judgment in this case on the basis of the rule against resale price maintenance.

resale price maintenance. Respondent's brief in opposition repeatedly defends the court's judgment on that basis and only on that basis. Opp. i ("the per se rule of Sherman Act section 1 liability forbids more than just 'resale price maintenance' "); Opp. 14 (rejecting as "doctrinal confusion" the position that "equate[s] vertical agreement over price and the specialized notion of 'resale price maintenance' "); Opp. 14-15 (proposed jury charges limiting *per se* vertical liability to resale price maintenance "would have straight-jacketed the jury" and "reflected neither the facts of this case nor the law of per se price fixing") (footnote omitted); Opp. 16-17 ("*Dr. Miles* . . . did not hold that a vertical price conspiracy must entail resale price maintenance. No decision of this Court holds that price fixing is a per se violation only in cases of 'resale price maintenance.' "); Opp. 17 ("Resale price maintenance created by manufacturer coercion is not the only per se unlawful vertical price fixing 'combination.' ").

That holding, however, is contrary to every relevant precedent and commentary, which uniformly recognize, as the leading treatise observes, that "as a matter of definition, all antitrust rules condemning vertical price fixing categorically apply only to *resale* price fixing, not to all vertical contracts setting prices." 8 P. Areeda, *Antitrust Law* 260 (1989); *see* Pet. 17, 23.[2] Respondent has not identified a single case from this Court or any court of appeals—because there is none—recognizing *per se* illegality for "vertical price fixing" other than for resale price maintenance. Opp. 16-21. Instead, with respect to this Court's decisions, respondent irrelevantly cites certain cases involving *horizontal* price fixing (Opp. 6, 10, 16,

[2] For example, resale price maintenance was the subject of *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724-27 (1988); *Monsanto*, 465 U.S. at 763, 765; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964); and *Dr. Miles*.

19, 26),[3] falsely suggests that *Monsanto* supports its legal theory (Opp. 18),[4] and alters a quotation from *Simpson v. Union Oil Co.* to make it appear, incorrectly, that the Court there treated vertical price fixing as covering more than resale price maintenance (Opp. 17).[5] With respect to circuit-court decisions, not only does respondent offer no support for its legal claim, but in trying to distinguish the cases cited in the petition (Opp. 20-21), respondent quotes passages confirming that other circuits have repeatedly recognized that vertical *per se* illegality applies only if the distributor agrees on its resale prices and have repeatedly rejected antitrust claims for that reason.[6] Quite simply, it cannot seriously be disputed that the Eleventh

[3] In its general assertions about the *per se* illegality of "price fixing," respondent cites *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); and *NCAA v. Board of Regents*, 468 U.S. 85 (1984)—every one of which addresses horizontal agreements among competitors.

[4] *Monsanto* by its terms involved an agreement whereby dealers agreed with a manufacturer to maintain their own resale prices—as respondent acknowledges. Opp. 18 ("one or more dealers combined with the manufacturer voluntarily to decide *on their own prices*" (emphasis added)).

[5] By adding its own word "vertical," respondent transforms the meaning of the quote excerpted from *Simpson*. Unaltered, the quoted sentence makes the general point that "Congress has closely patrolled price fixing whether effected through resale price maintenance agreements or otherwise" and, as authority, cites in the attached footnote, among other things, a *horizontal* price-fixing case, *Socony-Vacuum*, *supra*, 377 U.S. at 17 & n.2. It says nothing to the effect that *vertical* price fixing extends beyond *Dr. Miles*. The holding of *Simpson*, moreover, is explicitly limited to resale price maintenance: "we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal." 377 U.S. at 24.

[6] For example, the point is explicitly made in the parenthetical quotation from *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985), included at Opp. 20 n.24. Similarly, the parenthetical quotes follow-

Circuit's extension of vertical *per se* liability beyond resale price maintenance is in conflict with the decisions of this Court and all other relevant authority, including decisions of other courts of appeals.

The Eleventh Circuit, of course, made no effort to meet the stringent standards for adoption of a new *per se* rule imposing antitrust liability, and treble damages, without any market effects. *See Business Elecs.*, 485 U.S. at 723-24. Nor could those standards be met. This Court has specifically "recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints" (*id.* at 724), and it has three times deliberately contracted such *per se* liability, even *within* the rule against resale price maintenance—first in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), again in *Monsanto* (1984), and yet again in *Business Electronics* (1988).

It cannot be asserted, moreover, that experience shows manufacturer-distributor agreements on the manufacturer's prices to other distributors virtually never to have a legitimate justification. For example, such agreements may encourage the pro-competitive efforts of distributors (through testing and other activities) to link up buyers with particular sellers who can meet their special needs, providing a reward for such distributors even when they cannot serve as distributor over the long term after making the match, preventing free-riding off those efforts by other distributors, and maintaining the distributor's willingness to assist the manufacturer on future customer-development.[7] And such agreements often will be nothing

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ing the first two cases cited in Opp. 20 n.25—from the First and Eighth Circuits—expressly reject liability on the precise ground that the buyer-dealer did not agree on its resale prices. The authority could be multiplied many times over confirming the uniform recognition of other circuits that there is only one vertical *per se* rule—the *Dr. Miles* rule against resale price maintenance, which cannot apply here.

[7] Respondent is thus wrong to assert that this sort of arrangement is not "economically rational" for the manufacturer. Opp. 9. Of course, it is irrelevant to the question of adopting a *per se* rule

other than buyer-induced price discrimination agreements, which Congress specifically decided *not* to condemn as *per se* illegal. 15 U.S.C. § 13(f), because they can indeed be pro-competitive, as this Court explained in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82-83 (1979). In short, the Eleventh Circuit's new *per se* rule, imposing treble damages without any anticompetitive market effects, not only conflicts with otherwise-uniform judicial precedent (and statutory law) but threatens entirely legitimate conduct. This Court should not permit the decision to stand.

2. The Eleventh Circuit's ruling on antitrust injury independently warrants review. First, the Eleventh Circuit finding of antitrust injury, based on a terminated dealer's future inability to compete against minimum prices of a competitor, flatly contradicts this Court's repeated statements that "[a] competitor 'may not complain of conspiracies that . . . set minimum prices at *any* level.' " *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986)). *See* Pet. 25-27. Respondent, far from explaining away that contradiction, simply ignores it. Opp. 23-25. Likewise, respondent offers no defense of the court of appeals' refusal to look beyond the allegedly harmful act (here, the termination) to the underlying illegality (here, the alleged minimum resale price maintenance on the part of a competing distributor) and trace the damages back to "that which makes defendants' acts unlawful" (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). What that means, as the Fifth Circuit has held, is that if the same act would cause the same harm whether or not illegal, the harm is not antitrust injury—which it

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whether a jury in a particular case finds a particular justification present. That is a matter that would arise in a rule-of-reason case, but only if market effects could be shown—as respondent has conceded is impossible here.

cannot be in this case, because the termination of respondent's distributorship would have caused the same harm (alleged inability to compete) whether the termination was pursuant to resale price maintenance or not.[5] This Court should grant certiorari to adopt the Fifth Circuit approach and, reaffirming its conclusions in *Atlantic Richfield* and *Matsushita*, hold that no antitrust injury is present here.

Second, the Eleventh Circuit departed from the clear requirement of *Atlantic Richfield* that a private plaintiff must show specific anticompetitive effects over and above *per se* illegality. 495 U.S. at 343-44. Respondent answers by quoting a decision of this Court stating that market effects are not required for a showing of *per se* illegality (Opp. 26, quoting *NCAA v. Board of Regents, supra*), but this Court in *Atlantic Richfield*, of course, expressly held that antitrust injury is a requirement over and above illegality and that anticompetitive effects have to be shown even when *per se* illegality is proved. 495 U.S. at 342-45. Respondent also asserts, without citation, that higher prices to one consumer constitute a "classic anticompetitive effect." Opp. 26. But that is plainly wrong: an anticompetitive effect is one that harms "*competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). *See, e.g., United States v. Western Elec. Co.*, 900 F.2d 283, 290 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990) ("no damage to competition . . . unless [defendants] can exercise market power"). The Eleventh Circuit ignored this requirement in finding anti-

[5] The Fifth Circuit holding is *Anago, Inc. v. Tecnol Medical Prods., Inc.*, 976 F.2d 248 (1992). The United States, in its *amicus* brief on the petition for certiorari from the decision, has agreed with the Fifth Circuit that *Brunswick* requires that damages based on a future inability to compete be traced back beyond the harm-causing act to the specific illegality, with the result that the harm is not antitrust injury if the same action would cause the same harm whether or not illegal. 92-1274 U.S. Br. 4-7.

trust injury despite the conceded absence of any market effects in this case.

Finally, in finding that a terminated distributor complaining of future inability to compete had suffered antitrust injury, the Eleventh Circuit departed from the bare-minimum requirement, recognized with particular clarity in the Sixth Circuit, that the distributor have "proof that comparable alternative brands were not available." *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 459 F.2d 138, 148 (6th Cir. 1972); *Beach v. Viking Sewing Mach. Co.*, 784 F.2d 746, 752 (6th Cir. 1986). Respondent answers only that the requirement was met here (Opp. 27), but the Eleventh Circuit found lack of comparable alternatives only for *one* customer and only for *three* years. The Sixth Circuit decisions themselves make clear that a focus on particular customers (let alone on *one* customer) is incorrect and that comparability of substitutes is determined by a *market*-wide inquiry—necessarily so, since the antitrust-injary requirement measures effects on competition. *See Beach*, 784 F.2d at 752. And in any event, three years of unavailability could not conceivably meet the widely recognized requirement that, for proof of antitrust injury, the nexus to illegality be shown for the *entire* damages claimed—here, 34 years into the future. *See, e.g., Metrix Warehouse v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988). At a minimum, therefore, the Eleventh Circuit decision conflicts with the careful, disciplined, stringent approach to the antitrust-injury requirement adopted not only by this Court but by other circuits.

CONCLUSION

For those reasons, and for the reasons set forth in the petition for a writ of certiorari, the petition should be granted.[*]

Respectfully submitted.

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[*] We note that, after the petition was filed, respondent filed a motion (on October 28, 1993) asking Justice Kennedy to vacate the stay entered by the district court in this case. Petitioners filed a response on November 5, 1993. Justice Kennedy denied the motion.